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### Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

#### Opinion No. 71/2017 concerning Said Imasi (Australia)\*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 2 August 2017, the Working Group transmitted to the Government of Australia a communication concerning Said Imasi. The Government replied to the communication on 26 September 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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\* In accordance with rule 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

## Submissions

### *Communication from the source*

4. Said Imasi is a stateless person who has been recognized as such by the Australian Refugee Review Tribunal. He has no identity documents, birth documents or documents to prove his citizenship or nationality. He usually resides at the Immigration Detention Centre located on Christmas Island.

5. According to the source, Mr. Imasi believes that he was born in the Canary Islands on or about 27 March 1989. He believes that his mother is of Western Saharan origin, but he has no information about his father. He reportedly spent approximately six years living somewhere in Western Sahara or near that region. According to the source, it is likely that he lived in a refugee camp in Western Sahara or Algeria during that time.

6. The source reports that when Mr. Imasi was approximately six years old (around 1995), he was taken to Las Palmas and then to Madrid to reside in an orphanage. In approximately 1998, he ended up in Paris and became a street child. From approximately 1998 to 2000, when he was approximately nine to twelve years old, he worked as a domestic servant in a house in Belgium. According to the source, it appears likely that, at that time, he was the victim of human trafficking and was a slave. In 2000, Mr. Imasi went to the Netherlands and lived both in an open refugee camp and on the streets. In 2002, when he was approximately 14 years old, he was reportedly picked up by a criminal gang that operated across Europe. The gang allegedly used Mr. Imasi for various drug couriering and money laundering services.

7. In March 2004, Mr. Imasi went to Norway, where he stayed until January 2010. During his stay in Norway, he maintained his association with the criminal gang. He reportedly tried to leave the gang many times, but failed to do so for fear of reprisals. In November 2009, a gang member reportedly threatened him, holding a knife to his throat. Ultimately, Mr. Imasi left Norway on 27 January 2010, travelling through Brussels and Abu Dhabi to Australia.

8. On 28 January 2010, Mr. Imasi arrived by plane at Melbourne Tullamarine International Airport to seek asylum in Australia, due to the harm he feared from criminal gangs in Norway, and the inability of the authorities there to protect him.

9. The source notes that Mr. Imasi was originally granted a temporary protection visa by Norway, but it expired while he was in detention in Australia. According to the source, the Government of Norway has since refused to grant him another visa.

### *Detention*

10. According to the source, Mr. Imasi was arrested upon his arrival in Australia on 28 January 2010 by officials from the Department of Immigration and Border Protection. As far as Mr. Imasi recalls, they did not show him a warrant or any other decision by a public authority.

11. The source reports that upon his arrest at Tullamarine Airport, Mr. Imasi was transferred to a hotel in Melbourne Victoria for approximately three days. He was then transferred to Maribyrnong Immigration Detention Centre, where he stayed for approximately two years. In January 2012, he was transferred to Villawood Immigration Detention Centre, where he stayed for approximately one year. In January 2013, he was transferred back to Maribyrnong for around three months. He was subsequently returned to Villawood for approximately two years and four months, before being transferred back to Maribyrnong for approximately two months. On 15 October 2015, Mr. Imasi was transferred to Christmas Island Immigration Detention Centre for approximately three weeks, before being transferred to Yongah Hill Immigration Centre on 5 November 2015. He was subsequently transferred back to Christmas Island on 6 October 2016, where he remains today.

12. The source indicates that Mr. Imasi is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed

or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that “even a court” cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

13. However, according to the source, it is impossible for Mr. Imasi, as a stateless person, to be removed or deported from Australia. In addition, the Minister for Immigration and Border Protection has consistently refused to grant him a bridging visa or community detention placement, and he has not been offered the opportunity to apply for a protection visa.

14. The source indicates that, following his arrival in Australia on 28 January 2010, Mr. Imasi lodged an application for a protection visa on 2 February 2010, which was subsequently withdrawn on 8 April 2010. He lodged another application for a protection visa on 11 June 2010, which was rejected by the Minister for Immigration and Border Protection on 25 August 2010. The Minister’s decision was subsequently confirmed by the Refugee Review Tribunal on 20 September 2010. Mr. Imasi lodged another application for a protection visa, based on new legislative provisions, on 5 November 2013, which was rejected by the Minister for Immigration and Border Protection on 26 March 2014. That decision was subsequently confirmed by the Refugee Review Tribunal on 19 May 2014.

15. According to the source, Mr. Imasi subsequently applied to the Federal Circuit Court of Australia for judicial review of the decision of 19 May 2014 of the Refugee Review Tribunal. His application was dismissed on 17 October 2014. He then appealed that decision to the Full Federal Court of Australia for review, and his appeal was dismissed on 13 March 2015. In early 2015, Mr. Imasi lodged an application with the Minister for Immigration and Border Protection for an International Treaties Obligation Assessment, which was pending at the time of the submission by the source.

#### *Category II*

16. The source considers that Mr. Imasi has been deprived of liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. The source thus submits that Mr. Imasi’s detention constitutes arbitrary deprivation of his liberty, falling within category II of the arbitrary deprivation categories referred to by the Working Group when considering cases submitted to it.

#### *Category III*

17. The source also submits that the international norms relating to the right to a fair trial have not been observed in relation to Mr. Imasi’s detention, specifically those rights protected under articles 9 and 10 of the Universal Declaration of Human Rights, and article 9 of the International Covenant on Civil and Political Rights. The source notes that the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, requires that detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.

18. According to the source, one of the main reasons that Mr. Imasi remains in detention is the inability of the Minister for Immigration and Border Protection to establish his identity. Given Mr. Imasi’s history, including the absence of documentation for or registration of his birth, being raised in a refugee camp, then an orphanage and on the streets of Europe, it is almost impossible for him to have received any formal identification documents or retained them. The source reports that, apart from issues relating to the establishment of his identity, Mr. Imasi has not been notified of any adverse security assessment. According to the source, the Minister is, in effect, keeping Mr. Imasi detained while pursuing an impossible goal.

19. The source submits that, in the light of those circumstances and the time that has elapsed, it cannot be said that Mr. Imasi’s current detention is reasonable, necessary (given that all avenues to establish a formal identity for him that have been undertaken to date have failed) and proportionate. In that respect, the source refers to the case of *A. v. Australia*, in

which the Human Rights Committee held that a period of approximately four years of detention was prolonged and thus arbitrary and in breach of article 9 (1) of the Covenant.<sup>1</sup>

20. Accordingly, the source submits that Mr. Imasi's detention constitutes arbitrary deprivation of his liberty, falling under category III.

#### *Category IV*

21. The source also submits that Mr. Imasi, as an asylum seeker who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

22. In that respect, the source notes that the High Court of Australia, in its decision in the case of *Al-Kateb v. Godwin*, has upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source also notes that the Human Rights Committee, in its Views on *C. v. Australia*, held that there is no effective remedy for people subject to mandatory detention in Australia.<sup>2</sup>

23. As such, Mr. Imasi lacks any chance of his detention being the subject of a real administrative or judicial review or remedy. The source submits that his detention therefore constitutes arbitrary deprivation of liberty, falling under category IV.

#### *Category V*

24. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that, while Australian citizens can challenge administrative detention, non-citizens cannot. Therefore, the source submits that Mr. Imasi's detention constitutes arbitrary deprivation of his liberty, falling under category V.

#### *Response from the Government*

25. On 2 August 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 2 October 2017, detailed information about the current situation of Said Imasi and any comments on the source's allegations.

26. The Government of Australia replied on 26 September 2017. In its reply, it notes that Said Imasi is also known as Yassin Youssef. It confirms that he arrived in Australia on 28 January 2010. Upon arrival, he was detained in accordance with section 189 (1) of the Migration Act, as he arrived without a valid travel document or any other form of identification. The Government contests the claim that Mr. Imasi was arrested upon his arrival, noting that immigration officials do not have the power to arrest people as they are not police officers and no crime had been committed.

27. The Government explains that, in accordance with national legislation, all unlawful non-citizens must be kept in immigration detention until they are removed or deported from Australia, or granted a visa. That applies equally to those who may be stateless persons, as such persons can still be removed to a third country. In the case of Mr. Imasi, the Government argues that the Department of Immigration and Border Protection has been unable to establish his identity, which has caused a delay in the determination of his immigration status, and that his claim to statelessness is the subject of an ongoing investigation.

28. The Government agrees with the source that one of the reasons contributing to the continued detention of Mr. Imasi is the inability to establish his identity. The Government notes that Mr. Imasi has been interviewed by the Department of Immigration and Border Protection on several occasions since his arrival in order to establish his identity. On 11 January 2017, an Identity Assessment Report was issued, in which the authorities found that the identity Mr. Imasi was claiming could not be confirmed. A further identity investigation was initiated in February 2017. The Government indicates that there had also been a prior

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<sup>1</sup> See *A. v. Australia* (CCPR/C/59/D/560/1993), para. 9.4.

<sup>2</sup> See *C. v. Australia* (CCPR/C/76/D/900/1999), para. 7.4.

identity investigation in 2016, which had also found that Mr. Imasi's claimed identity could not be supported. The Government alleges that Mr. Imasi has not been cooperative in providing information to the Department of Immigration and Border Protection by consistently providing contradictory biographical details. Extensive international identity checks are currently being conducted and the investigation will be finalized as soon as possible.

29. The Government denies that Mr. Imasi, as an asylum seeker, had been denied the possibility of administrative or judicial review or remedy, arguing that the decisions to refuse Mr. Imasi protection were subject to both merits review and review by courts. On 11 June 2010 and 6 November 2013 respectively, Mr. Imasi lodged permanent protection visa applications, which were both denied, as the Department of Immigration and Border Protection found that Mr. Imasi's case did not engage the protection obligations of Australia. Both of those decisions were subsequently reviewed by the Refugee Review Tribunal, which confirmed them.

30. The Government argues that on 26 July 2017, the Minister for Immigration and Border Protection agreed to intervene under section 48B of the Migration Act to allow Mr. Imasi to lodge an application for a temporary protection visa or a safe haven enterprise visa. On 5 September 2017, the Department of Immigration and Border Protection advised Mr. Imasi of that decision and he lodged an application for a safe haven enterprise visa on 13 September 2017.

31. The Government objects to the source's claim that Mr. Imasi's detention is not reasonable, necessary and proportionate. According to the Government, limitations on rights in international law are permissible provided they are necessary in order to achieve a legitimate aim and are reasonable, necessary and proportionate to that end. The Department of Immigration and Border Protection argues that the detention of unlawful non-citizens meets that standard because it is necessary to ensure the integrity of the Australian migration programme.

32. The Government underlines Mr. Imasi's failure to cooperate with the Department of Immigration and Border Protection in its attempts to establish his identity. It notes that three review mechanisms are available for a regular review of the merits of detention: (a) detention review managers who ensure the lawfulness and reasonableness of detention by reviewing all detention decisions; (b) detention review committees, held monthly, to review the ongoing lawfulness and reasonableness of the decision to detain in relation to all detention cases; and (c) part of the ongoing review of individuals in immigration detention includes a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved.

*Additional information from the source*

33. On 27 September 2017, the reply from the Government was transmitted to the source for its additional comments, with a request to reply by 11 October 2017. The source responded on 6 October 2017.

34. In its response, the source contests the submission by the Government that Mr. Imasi has been uncooperative in the attempts of the Department of Immigration and Border Protection to establish his identity. The source submits that Mr. Imasi's case is an extreme example of statelessness, as he has no known birth date, birth place or family origins. The source submits that Mr. Imasi has attempted to assist the authorities, including by providing his fingerprints for the authorities to send to various organizations both domestically and internationally, but that he is unable to provide the Department of Immigration and Border Protection with the information requested as he simply has no knowledge of it. The source argues that the authorities have had eight years to conduct the investigations, which have not provided any conclusive information. In the view of the source, that should indicate to the authorities that the information sought really does not exist.

35. The source confirms that Mr. Imasi was given an opportunity to reapply for a protection visa in September 2017. However, the source expresses doubts about the potential outcome of that application, as the application form required the details of Mr. Imasi's

identity, nationality or citizenship, which are all disputed in the current identity investigation by the Department of Immigration and Border Protection.

### **Discussion**

36. The Working Group notes with appreciation the timely engagement of both the Government of Australia and the source in providing a detailed account of the events surrounding the present case.

37. The source has submitted that Mr. Imasi's detention falls under categories II, III, IV and V. The Working Group shall consider them in turn.

38. The source argues that Mr. Imasi has been deprived of his liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. The source thus submits that Mr. Imasi's detention constitutes arbitrary deprivation of his liberty, falling under category II.

39. The Working Group reiterates that seeking asylum is not a criminal act;<sup>3</sup> on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol. The Working Group notes that those instruments constitute international legal obligations that Australia has undertaken.

40. The Working Group notes that Mr. Imasi is a stateless person who arrived in Australia on 28 January 2010 in order to seek asylum, and who has lived in Australia since then, being transferred to a number of different offshore and onshore immigration detention facilities. In that respect, the Working Group notes the submission of the Government contesting the allegation that Mr. Imasi was arrested upon arrival in Australia and arguing that he was not arrested, but rather detained as no criminal offence had been committed. The Working Group thus concludes that Mr. Imasi was subjected to the mandatory immigration detention policy of the Government of Australia for those arriving to Australia without a valid visa, a fact that the Government has not contested in its reply.

41. The Working Group notes that asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.<sup>4</sup> The case of Mr. Imasi can under no circumstances be said to fall under that category of detention for a brief initial period, as his detention has lasted for nearly eight years. Moreover, the Working Group also notes that the Human Rights Committee, in its most recent concluding observations on Australia, expressed concern about the compatibility of the mandatory immigration detention in practice in Australia with article 9 of the Covenant due to the lengthy periods of migrant detention it allows.<sup>5</sup> Mr. Imasi's case is a stark example of such lengthy detention.

42. The Working Group notes that detention in the course of migration proceedings is not unlawful in itself. However, such detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.<sup>6</sup> It must not be punitive in nature and should be based on the individual assessment of each individual.

43. In the present case, the Working Group notes that in its reply, explaining the mandatory immigration detention policy, the Government of Australia submitted that the policy provides it with an opportunity to assess any risks that those arriving without a visa might pose to the Australian community. Yet the Government has failed to provide any details of such assessments that were carried out in Mr. Imasi's case following his arrival that may have justified the need for his detention. In fact, the source has submitted that since Mr. Imasi's arrival in Australia nearly eight years ago, he has never been notified of any adverse

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<sup>3</sup> See opinions No. 28/2017, No. 42/2017 and No. 72/2017.

<sup>4</sup> See Human Rights Committee, general comment No. 35, para. 18.

<sup>5</sup> See CCPR/C/AUS/CO/6, paras. 37–38.

<sup>6</sup> See Human Rights Committee, general comment No. 35, para. 18. See also CCPR/C/AUS/CO/6 paras. 37–38.

security assessment. The Working Group notes that the Government has not rebutted that allegation, although it had the opportunity to do so.

44. The Working Group recalls that deprivation of liberty in the migration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.<sup>7</sup> In its general comment No. 35, the Human Rights Committee argued that asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security (para. 18).

45. In its response, the Government of Australia has failed to explain the individualized, specific reasons that would justify the need to deprive Mr. Imasi of his liberty. It is thus clear to the Working Group that there was no individualized assessment carried out in relation to the need to detain Mr. Imasi during the consideration of his asylum claim and no alternatives to deprivation of liberty were examined to ensure that his detention would be the measure of last resort. Mr. Imasi was subjected to a mandatory immigration detention policy. Such policies are contrary to article 9 of the Covenant and breach the right to seek asylum as envisaged in international law. The Working Group therefore concludes that Mr. Imasi was detained due to his exercise of the right to seek asylum and his detention is arbitrary, falling under category II.

46. The source has submitted that Mr. Imasi's continued detention since 28 January 2010 falls under categories III and IV as he has been held in administrative detention for nearly eight years, without the possibility of challenging his detention before a judicial authority. The source has submitted that Mr. Imasi's detention for such a long period of time cannot justify the requirements of reasonableness, necessity and proportionality as required by article 9 of the Covenant.

47. The Working Group has already established that a mandatory immigration detention policy breaches article 9 of the Covenant, as it fails to respect the requirements of reasonableness, necessity and proportionality of detention since no individualized assessment of the need to detain is carried out. In the present case, the need to detain Mr. Imasi was never considered and no adverse security assessments have been conducted in relation to Mr. Imasi. What appears to lie at the heart of Mr. Imasi's extraordinary lengthy detention is the inability of the Government of Australia to establish his identity.

48. The Working Group notes that at least three identity investigations have been undertaken, the latest of which is ongoing. The Working Group also notes the real challenge that Mr. Imasi's case presents to the Australian authorities and the efforts made by the Government. Yet Mr. Imasi has been in detention for nearly eight years and the repeated investigations by the Australian authorities have not allowed for the establishment of his identity with certainty. The Working Group is not convinced that the allegations made by the Government about Mr. Imasi's failure to cooperate are of particular relevance here, as the authorities have had nearly eight years for their investigations, a considerable period of time that should have been more than sufficient. Moreover, the Working Group notes that both the Federal Court of Australia and the Refugee Review Tribunal found the account provided by Mr. Imasi to be generally consistent with the information available from sources in Germany, Norway and other countries, although his true identity was found to be uncertain.<sup>8</sup>

49. The Working Group finds itself in agreement with the source that Mr. Imasi's case appears to present an extreme example of statelessness as that of someone with no known birth date, birth place or family origins. It therefore appears to the Working Group that Mr. Imasi's true identity may be impossible to determine. The Working Group appreciates the challenge that such an extreme example poses to the Australian authorities. Yet the Working Group cannot accept that that challenge justifies such an extraordinary lengthy detention. As

<sup>7</sup> See A/HRC/10/21, para. 67.

<sup>8</sup> See *SZUNZ v. Minister for Immigration and Border Protection* (2015), Federal Court of Australia Full Court, 32.

the Working Group has repeatedly pointed out, detention of asylum seekers must never be unlimited or of excessive length, and a maximum period should be imperatively provided by law.<sup>9</sup>

50. Moreover, the Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>10</sup> That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>11</sup> and all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings but also situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.<sup>12</sup> Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>13</sup>

51. As the Working Group has stated previously, detention in the migration context must be ordered or approved by a judicial authority and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, which should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review.<sup>14</sup> However, that has not taken place in Mr. Imasi's case. Although the Government has submitted that all detention cases are subjected to three different review mechanisms, none of the three are in fact judicial mechanisms. Thus, since the date of his detention, Mr. Imasi has not been able to challenge the legality of his continued detention before a judicial authority, which is a clear breach of article 9 (4) of the Covenant. Consequently, the Working Group concludes that Mr. Imasi's detention is arbitrary and falls under category IV and not category III as submitted by the source.

52. The source has also argued that Mr. Imasi's detention is arbitrary and falls under category V since, according to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The Working Group is aware of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin*, which effectively means that, while Australian citizens can challenge administrative detention, non-citizens cannot.

53. The Working Group has already noted the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.<sup>15</sup> The Working Group also notes that the effect of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin* is such that non-citizens have no effective remedy against their continued administrative detention.

54. The Working Group specifically notes the decision of the Human Rights Committee in paragraph 9.3 of *F.J. et al. v. Australia*. In that case, the Committee examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment is such that there is no effective remedy to challenge the legality of continued administrative detention.

<sup>9</sup> See opinions No. 5/2009 and No. 42/2017; deliberation No. 5, principle 7; and A/HRC/13/30, para. 61.

<sup>10</sup> See A/HRC/30/37, paras. 2–3.

<sup>11</sup> *Ibid.*, para. 11.

<sup>12</sup> *Ibid.*, para. 47 (a).

<sup>13</sup> *Ibid.*, para. 47 (b).

<sup>14</sup> See A/HRC/13/30, para. 61. See also opinion No. 42/2017.

<sup>15</sup> See *C. v. Australia* (CCPR/C/76/D/900/1999); *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004); *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).



55. In the past, the Working Group has concurred with the views of the Human Rights Committee that the decision in *Al-Kateb v. Godwin* effectively means that non-citizens are unable to challenge the continued legality of their administrative detention in Australia.<sup>16</sup> This remains the position of the Working Group in the present case too. The Working Group underlines the fact that that situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that Mr. Imasi's detention is arbitrary, falling under category V, since there is no effective remedy for non-citizens to challenge the legality of their detention in Australia.

56. Lastly, on 7 August 2017, the Working Group sent a request to the Government to undertake a follow-up visit, and as at the date of adoption of the present opinion, it was awaiting a positive response. The Working Group reiterates that it would welcome the opportunity to conduct a visit to Australia and its offshore detention facilities in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

### **Disposition**

57. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Said Imasi, being in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

58. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Imasi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

59. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Imasi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

### **Follow-up procedure**

60. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Imasi has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Imasi;
- (c) Whether an investigation has been conducted into the violation of Mr. Imasi's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

61. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

62. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would

<sup>16</sup> See opinions No. 28/2017 and No. 42/2017.

enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

63. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>17</sup>

*[Adopted on 21 November 2017]*

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<sup>17</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.